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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-85

OAKLAND RAIDERS, a Limited Partnership,
Petitioner,

vs.

OFFICE OF EMERGENCY PREPAREDNESS, COST OF LIVING COUNCIL, Agencies of the Government of the United States of America, RALPH D. BURNS, an Individual,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Temporary Emergency Court of Appeals
of the United States

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OFFICE OF EMERGENCY PREPAREDNESS, COST OF LIVING COUNCIL, Agencies of the Government of the United States of America, RALPH D. BURNS, an Individual,
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Petitioner, Oakland Raiders, a Limited Partnership, prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in the above case on July 10, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California is not yet reported and appears as Appendix A. No opinion was delivered by the Temporary Emergency Court of Appeals and its judgment affirming the order of the District Court appears as Appendix B.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 10, 1974. The jurisdiction of this Court is invoked under § 211(g) of the Economic Stabilization Act Amendments of 1971. P.L. 92-210; 85 Stat. 743.

QUESTIONS PRESENTED

Preface

Petitioners herein sought declaratory judgment in the District Court determining that petitioners were not in violation of the Economic Stabilization Act of 1970 or Executive Order 11615 by virtue of the pre-August 15, 1971, sale of season football tickets at prices higher than those charged for 1970 season football tickets. A similar action was filed by The Five Smiths, Inc., owners and operators of the Atlanta Falcons professional football club in the United States District Court for the Northern District of Georgia against William H. Holloway, et al. (TECA No. 5-7). Two related cases, *Burt DeRieux, et al. v. The Five Smiths,*

Inc. (TECA No. 5-6) and *United States of America v. The Five Smiths, Inc.* (TECA No. 5-8) were consolidated with *The Five Smiths* case and all questions raised in the three cases were certified to the Temporary Emergency Court of Appeals of the United States. (The consolidated cases will hereinafter be referred to as *DeRieux*.) On June 20, 1974, an opinion was delivered by the TECA[1] in *DeRieux* and thereafter, on July 10, 1974, the TECA affirmed the judgment of the District Court in the instant case solely on the authority of *DeRieux*.

The questions presented by this petition are:

(1) Whether the Court properly declined to hold unlawful and set aside Executive Order 11615 as required by Section 706(2)(D) of the Administrative Procedure Act notwithstanding a finding by the TECA in *DeRieux* that the President is subject to Section 553 of the Administrative Procedure Act and a further finding that the procedures set forth in that section were not observed.

(2) Whether the construction of Executive Order 11615 to require refunds of price increases for regular season games played between August 15, 1971 and November 13, 1971, notwithstanding that the tickets were sold prior to August 15, 1971 constituted an *ex post facto* law and the taking of property without just compensation.

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[1]Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

The following constitutional provisions are involved in the case at bar:

> "No Bill of Attainder or ex post facto Law shall be passed." Constitution, Article I, § 9, cl. 3.
>
> "No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation." Constitution, Amendment V.

In addition to the foregoing The Administrative Procedure Act, 5 U.S.C. §§ 551, 553, 706[2] and Executive Order 11615[3] are likewise involved.

STATEMENT OF CASE

This case arrives out of the issuance, on August 15, 1971, of Executive Order 11615, which order imposed 90-day wage and price controls which have become known as Phase I. It is the contention of petitioners that the Order was not properly issued as required by the Administrative Procedure Act and further that the construction of the order adopted by the Temporary Emergency Court of Appeals insofar as it affects petitioner constitutes an *ex post facto* law and the taking of property without just compensation.

Petitioner (hereinafter referred to as Raiders) owns and operates the professional football team known as the Oakland Raiders. Prior to February 1971 Raiders

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[2]Appendix D.
[3]Appendix E.

decided to increase the price of tickets to football games during the 1971 season over those charged for the 1970 season. In February of 1971, season ticket applications setting forth the increased prices were forwarded to all 1970 Raider season ticket holders. The bulk of 1970 season ticket holders renewed their tickets for the 1971 season and the tickets of those who did not renew were offered to, and accepted by, new season ticket purchasers.

By June 30, 1971, payment in full had been received for in excess of 48,000 season tickets, out of 54,000 total seats available. Between July 23 and July 27, 1971, season tickets were mailed to the respective season ticket holders.

On August 9 and August 14, 1971, Raiders played home pre-season football games at the 1971 prices. Raiders had historically charged 50¢ less for pre-season tickets than for regular season tickets.

On August 15, 1971 the President issued Executive Order 11615 imposing wage and price controls for the 90-day period August 15 to November 13, 1971. The government stipulated in *DeRieux* that no notice of an intention to issue the Order was given prior to its issuance, nor was a finding made and/or incorporated in the Order that notice and public procedure thereon were impracticable, unnecessary, or contrary to the public interest. (App. C, pages 28-29, 32.)

Raiders performed three regular season home games during the Phase I period. Respondent contends that, inasmuch as tickets to the three games were 50¢ more than to the two pre-season games

played prior to August 15, 1971 Raiders unlawfully increased prices during Phase I.

On November 16, 1971 Raiders filed this action to determine the validity of the government contentions.

On January 2, 1974 the District Court for the Northern District of California made its order granting summary judgment to defendant, the Office of Emergency Preparedness, and ordered restitution of 50¢ per ticket for the three regular season home games played between August 15 and November 13, 1971.

On appeal, the Temporary Emergency Court of Appeals, without opinion, affirmed the judgment of the District Court "on the authority of *DeRieux v. The Five Smiths, Inc.*" Appendix C.

In *DeRieux* the court considered the Administrative Procedure Act (APA) argument advanced by The Five Smiths, which argument was also advanced by Raiders and held that, assuming the President is an "agency" within Section 1, 5 U.S.C. § 551, of the APA and further assuming he was engaged in rule-making within Section 4, 5 U.S.C. § 553 of the APA when he issued Executive Order 11615, the order would not be set aside even though the Government had stipulated that no notice of rule-making was given nor finding made and or incorporated in the order that notice was "impracticable, unnecessary, or contrary to public interest."

The court further held that the Executive Order, as construed, did not violate the constitutional pro-

hibition against *ex post facto* laws as it did not *punish* The Five Smiths for prior conduct nor did it constitute the taking of property without just compensation as The Five Smiths did not have a vested and unqualified right to the proceeds of tickets sold prior to August 15, 1971.

REASONS FOR GRANTING WRIT

I.

BY REFUSING TO HOLD EXECUTIVE ORDER 11615 INVALID AS REQUIRED BY SECTION 706(2)(D) OF THE ADMINISTRATIVE PROCEDURE ACT, NOTWITHSTANDING AN ASSUMPTION THAT THE PRESIDENT IS AN "AGENCY" WITHIN SECTION 551 OF THE APA AND WAS ENGAGED IN "RULE-MAKING" WITHIN SECTION 553 OF THE APA, THE TEMPORARY EMERGENCY COURT OF APPEALS HAS FURTHER PERPETUATED A CONFLICT AMONG SEVERAL COURTS OF APPEAL AS TO THE EFFECT OF NON-COMPLIANCE WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AS SET FORTH IN SECTION 553 OF THE ACT.

The APA, 5 U.S.C. §§551, 553, generally requires hat an agency, prior to engaging in rule-making, ublish general notice of such proposed rule-making the Federal Register and thereafter afford interested persons an opportunity to participate in rule-aking through submission of written data, views or rguments.

5 U.S.C. § 706(2)(D) states that a reviewing court hall:

> "Hold unlawful and set aside agency action, findings and conclusions found to be——
>
> . . .

(D) without observance of procedure required by law."

. . .

The only relevant exception to Section 553 states that the procedural requirements do not apply:

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest."

The TECA in *DeRieux* (App. C, page 30) assumed the President is an "agency" within the mean of the Administrative Procedure Act. Such an assumption is a proper one, and is buttressed by the opinion of Judge Leventhal in *Amalgamated Meat Cutters and Butcher Work. v. Connally*, 337 F.Supp. 737 (1971) (D.D.C.), page 761, wherein he noted:

"The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term 'agency' in the APA includes the President—a conclusion fortified by the care taken to make express exclusion of 'Congress' and 'the courts'."

The President is clearly subject to the requirements of the Administrative Procedures Act and Executive Order 11615 is, without doubt, a "rule" within the meaning of Section 551(4), a fact which was assumed by the Temporary Emergency Court of Appeals.

Given the foregoing premise and the Government's stipulation that no finding was made and/or incorpo-

rated in the Order by the President that notice and public procedure thereon was impracticable, unnecessary, or contrary to public interest, the provisions of the APA have clearly been violated.

The TECA, after the fact, then made a finding that good cause had existed for the issuance of the Order without findings and/or statement of impracticability and declined to void the Order stating:

> "We cannot agree that Congress intended to visit such consequence upon a technical violation of Section 553(b) where the reasons for exempting the President's action from the notice requirement are so obvious and compelling." (App. C, page 32.)

The Court then cited opinions of the Third and Fourth Circuits in the cases of *Appalachian Power Co. v. Environmental Protection Agency,* 4 Cir., 477 F.2d 495 (1973) and *Duquesne Light Co. v. Environmental Protection Agency,* 3 Cir., 41 F.2d 1 (1973) refusing to declare invalid state Clean Air plans which had been approved by the Administrator of the Environmental Protection Agency without notice as required by Section 553 of the APA.

The basis for such rulings, however, was a finding that Congress intended to create an exception to the requirements of Section 553 for the Clean Air Act when it required public notice and hearing at the state level prior to adoption of state plans which were thereafter submitted to the Administrator of the EPA.

As stated in the *Appalachian Power* case, *supra,* p. 503:

> "This conclusion, however, is based on the assumption that at the state hearing interested parties were offered full opportunity to present their contentions with respect to the proposed plan . . ."

In determining the same question, that is the validity of approval by the Administrator of the EPA of state Clean Air plans without notice and public procedure, the Court of Appeals of the Sixth Circuit in *Buckeye Power, Inc. v. Environmental Protection Agency,* 481 F.2d 162 (1973) held the approval invalid.

Furthermore, in an earlier Third Circuit case, *Texaco v. Federal Power Commission,* 412 F.2d 740 (1969) the court held that a regulation issued without compliance with the Administrative Procedure Act was invalid. Similar results have obtained in lower Federal Court. See *Kelly v. United States Department of Interior,* 339 F. Supp. 1095 (E.D.Cal. 1972); *Staley Mfg. Co. v. United States,* 310 F. Supp. 485 (D. Minn. 1970); *Pharmaceutical Manufacturers Assoc. v. Finch,* 307 F. Supp. 858 (D.Del. 1970); *National Motor Freight Traffic Association v. United States,* 268 F. Supp. 90 (D.D.C. 1967), aff'd 393 U.S. 18 (1968).

In addition to perpetuating the conflict among several Circuits regarding the effect of a violation of the Administrative Procedure Act, the failure of the Temporary Emergency Court of Appeals to invalidate the Executive Order effectively denies enforcement of the APA as mandated by Congress. As the Dis-

trict Court noted in *Kelly* wherein an administrative regulation was held invalid for failure to comply with the exception provisions of Section 553(b)(B):

> "... Upholding regulations which we think were defectively issued, furthermore, emasculates the Administrative Procedure Act. As the Court of Appeals for the Ninth Circuit has said, 'If notice of a proposed rule is not published in the Federal Register at least thirty days prior to its issuance, or if good cause is not found *and published* for the immediate issuance of a rule, the rule cannot be legally issued.' (Emphasis ours.) Hotch v. United States, supra, 212 F.2d 284. We therefore find the amended regulations to have been illegally issued." 339 F. Supp. 1101-1102.

It is respectfully submitted that in order to resolve the conflict among the several Circuits and further to enforce the Congressional mandate contained in the Administrative Procedure Act that a writ should issue in the instant case.

II.

THE CONSTRUCTION BY THE TEMPORARY EMERGENCY COURT OF APPEALS, OF EXECUTIVE ORDER 11615 TO REQUIRE RAIDERS TO REFUND AMOUNTS RECEIVED PRIOR TO AUGUST 15, 1971 VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS AND THE TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN CONFLICT WITH DECISIONS OF THIS COURT.

The constitutional prohibition against *ex post facto* laws is clear and such laws have been defined by this Court as follows:

> "The state legislature can pass no ex post facto law. An *ex post facto* law is one which renders an act punishable in a manner in which it was

> not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 138 (1809).

The Temporary Emergency Court of Appeals in *DeRieux* took the position that the Executive Order could not be said to "punish" The Five Smiths within the meaning of the cited cases. Raiders contend that the case most nearly in point, *Burgess v. Salmon,* 97 U.S. (7 Otto) 381, 24 L.Ed. 1104 (1878) was improperly ignored by the TECA.

In *Burgess,* a tobacco merchant taxpayer brought a civil suit for refund against the Collector of Internal Revenue alleging that during the morning of March 3, 1875, he had sold and delivered a quantity of tobacco when the transfer tax on tobacco was 20¢ per pound. In the afternoon of March 3 the President signed an amendment to the tax statute increasing the rate to 24¢ per pound. The merchant then paid the additional tax and sought his refund.

This Court held that the application of the amendment to the sale and delivery of tobacco prior to its effective date constituted an *ex post facto* law and stated:

> "To impose upon the owner of the goods a criminal punishment, or a penalty of $377 for not paying an additional tax of four cents a pound,

would subject him to the operation of an ex post facto law.

An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. Carpenter v. Pa., 17 How., 456.

Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an ex post facto law." 97 U.S. 384, 24 L.Ed. 1106.

The analogy to the instant case is clear. That is, prior to the effective date of the Executive Order, Raiders had sold and delivered over 48,000 season tickets and had received payment therefor. To require Raiders to now refund a portion of the consideration received flies in the teeth of the above holding.

The holding of the TECA likewise disregards the holding of this Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 79 L.Ed. 1593 (1935) wherein the Court unanimously held the Frazier-Lemke Act to be an unconstitutional taking of mortgagees' property rights without payment of just compensation as it applied to existing mortgages. *Joint Stock Land Bank* further clearly held that the extent of pre-existing property rights held by the parties thereto was a question of pre-existing state law.

In the instant case, pre-existing state law made a ticket of admission to a public place of amusement, when sold:

> ". . . at least an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance. (Greenberg v. Western Turf Assn., 140 Cal. 360, [73 Pac. 1050].) Such a ticket, therefore, represents a right, positive or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also necessarily a species of property. As such, the owner thereof, in the absence of any condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it; to sell it to whom he pleases and at such price as he can obtain." *Ex Parte Quarg*, 149 Cal. 79, 81, 84 P. 766 (1906).

Thus, prior to August 15, 1971, Raiders had the same unqualified title to monies received from purchasers of season tickets that all purveyors of goods have once they have parted with their wares, that is, an absolute right to use the funds subject only to a claim by the purchaser in the event there is a failure of consideration. Such rights were vested within the meaning of the *Joint Stock Land Bank* case and the requirement that Raiders refund a portion of the funds amounts to the taking of property without just compensation in derogation of both the Constitution and the decisions of this Court.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Temporary Emergency Court of Appeals.

Dated, Oakland, California,
August 5, 1974.

Respectfully submitted,
HERMAN COOK,
RALPH A. LOMBARDI,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. C-71-2214 RFP

Oakland Raiders, etc.,
Plaintiff,
vs.
Office of Emergency Preparedness, et al.,
Defendants.

[Filed Jan. 25, 1974]

MEMORANDUM AND ORDER

Plaintiffs Oakland Raiders (Raiders) brought this action seeking a declaratory judgment that their increase in ticket prices for the 1971 football season did not violate the so-called "wage-price freeze" imposed by the President on August 15, 1971. The action came on for hearing before the court on September 17, 1973, on a motion for summary judgment by the defendants, namely, the Office of Emergency Preparedness (OEP), Cost of Living Council (COLC), and Ralph D. Burns.

In early 1971, the Raiders sent out renewal applications to all their season ticketholders from the previous year; all ticket prices had been increased over the 1970 prices. By late June, over 48,000 season tickets (out of a total stadium capacity of 54,000) had been

purchased and paid in full. These tickets were mailed to the purchasers in late July.

On August 9 and 14, 1971, the Raiders played their first two exhibition games of the 1971 season at home. On August 15, the President issued Executive Order 11615 (36 Fed. Reg. 15727), proclaiming the "wage-price freeze"; the legal basis for the freeze was found in the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799. The Raiders subsequently played two more exhibition games at home, then in October played three regular season home football games at ticket prices that were $.50 over those charged for the exhibition games. Thereafter, during Phase II, the Raiders played four additional home games.

Under the provisions of Executive Order 11615, prices were to be stabilized at a level not exceeding the highest prices pertaining to a substantial volume of actual transactions during the 30-day "base period" ending August 14, 1971.

Defendants appear to concede, as indeed they must, that the playing of two exhibition games during the "base period" prior to August 15 was sufficient to legitimize the increase over 1970 prices; and defendants further appear to concede that the further increase in ticket prices for regular season games over the price charged for exhibition games was legitimate under the Phase II guidelines as to all games after November 13, 1971. Thus the primary point of contention seems to be the validity of the $.50 price increase for the three regular season home games played during October 1971.

Regulations issued by the OEP in Economic Stabilization Circular No. 11, 36 Fed.Reg. 18315 (September 11, 1971), provide that "the freeze applies to prices of advance sale tickets for sporting events occurring during the freeze." If these regulations are correct in their interpretation of the effects of the freeze, then ticket prices for all sporting events occurring during Phase I of the freeze would be restricted to the highest level set by a substantial volume of transactions during the base period prior to August 14; and since the term "transaction" is thereby deemed to embrace the actual performance of the event rather than the mere sale of tickets, the effect would be to freeze ticket prices at the level of the tickets sold for events actually occurring during the base period, namely, the two exhibition games.

The Raiders have argued against this interpretation of the freeze provisions on several grounds, including: (1) that the OEP has misinterpreted the phrase "actual transactions," which should be read to include only the ticket sale itself and not the performance of the actual sporting event; (2) that the OEP is arbitrary in its treatment of sporting events, since it has refused to roll back tuition increases by educational institutions in situations where payment was made before the freeze for delivery of services during the freeze period; and (3) that the entire framework of delegated authority established by the Economic Stabilization Act and Executive Order 11615 is unconstitutionally broad.

As the Raiders recognize, all three of these arguments have already been carefully considered and

rejected by other courts. In *University of Southern California (USC) v. Cost of Living Council,* 472 F.2d 1065 (Temp. Emer.Ct.App. 1972), *cert. denied* .....U.S. ..... (Feb. 20, 1973), the Temporary Emergency Court of Appeals upheld the OEP's interpretation of "actual transaction" as applied to advance sales of tickets for sporting events and rejected the suggested analogy to tuition increases on the basis of the "particularly singular nature of education as a whole." 472 F.2d at 1071-72. The court also rejected attacks on the constitutionality of the wage-price controls with an approving citation to *Amalgamated Meat Cutters v. Connally,* 337 F.Supp. 737 (D.D.C. 1971), in which a three-judge court carefully examined all aspects of the delegation of authority under the Economic Stabilization Act and upheld the Act's constitutionality. After disposing of these contentions the court held that advance sale tickets for football games were in fact subject to the freeze and remanded the case to the District Court with indications that the refund sought by the OEP should be granted.

The Raiders seek to distinguish their own situation from the facts in *USC v. Cost of Living Council, supra,* on the grounds that the Raiders' tickets were sold as part of a season ticket package rather than as individual game tickets; thus, they argue, it is improper to assign a higher price to the regular season tickets in the season ticket package than the price assigned to the exhibition game tickets in the same package. If this reasoning is followed and the price of the season ticket package is pro-rated evenly over all the home games for the 1971 season, regardless of

whether they were exhibition games or regular season games, then it is evident that there was no price *increase* from the exhibition tickets to the regular season tickets. However, as defendants have pointed ont, each ticket in the season ticket package has a price printed on it equal to the price which would have been charged for that ticket if purchased individually at the gate prior to the game; moreover, the stipulation of facts entered into by counsel for the Raiders concedes that the total price of the season ticket package equals the sum of the prices of each individual ticket in the package.

It is therefore clear, and this court so finds, that Raider ticket purchasers paid $.50 per ticket more for regular season games than for exhibition games. For the reasons stated above, this increased ticket price for the three home games played in October 1971 violated the terms of the wage-price freeze.

The remedy sought by OEP on its counterclaim takes the form of a refund to identifiable ticket purchasers and a reduction in ticket prices for the next season until the remainder of the illegal overcharges has been dissipated. Under the initial version of the Economic Stabilization Act of 1970, the sole remedies available to the government were a $5000.00 fine and injunctive relief, including mandatory injunctions. P.L. 91-379, §§ 204, 205. It was not until the amendments of December 22, 1971, that express authority was given to the courts to order restitution of overcharges as part of the relief available. P.L. 92-210, § 209. Nevertheless, in the *USC* case, *supra*, the Temporary Emergency Court of Appeals held that even

under the Act as it existed prior to the amendments, "the power to issue mandatory injunctions includes the power to order restitution or refund of funds held in violation of the regulations and rulings of the CLC and the OEP." 472 F.2d at 1070. Thus there can be no question of this court's power to grant the relief sought by the OEP herein.

On the basis of the entire record, including the arguments submitted on behalf of all parties, this court finds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That the defendants' motion be granted, and that this summary judgment in their favor and against the plaintiff be entered accordingly; and

2. That as part hereof, the plaintiff shall forthwith make restitution by refunding all unlawful overcharges (as identified above) to the affected ticket purchasers; and, where such ticket purchasers are not identifiable, plaintiff shall disgorge its unlawful gains by reducing ticket prices for box office sales at home games during the next regular season by the amount of the illegal increase, i.e., $.50, until the total amount of reimbursements due unidentifiable ticket purchasers is exhausted.

Dated: Done Dec. 28, 1973

Signed January 2, 1974

/s Robert H. Peckham

United States District Judge

Appendix B

Temporary Emergency Court of Appeals
for the United States

Oakland Raiders, Plaintiff-Appellant, vs. Office of Emergency Preparedness, Cost of Living Council, and Ralph D. Burns, Defendants-Appellees.	No. 9-11

[Filed July 10, 1974]

Appeal from the United States District Court
Northern District of California

ORDER

Herman Cook and Ralph A. Lombardi, Attorneys, (Hardin, Cook, Loper, Engel & Bergez) Oakland, California for the Appellants.

Paul T. Michael, Attorney (Department of Justice, Carla A. Hills, Assistant Attorney General and Stanley D. Rose on the briefs) Washington, D. C., for the Appellees.

Before: CARTER, CHRISTENSEN and ESTES, Judges.

The judgment is affirmed on the authority of *DeRieux v. The Five Smiths, Inc.* (T.E.C.A., June 20, 1974, No. 5-6, No. 5-7 and No. 5-8) ..... F.2d .....

Appendix C

Temporary Emergency Court of Appeals
of the United States

Burt DeRieux, et al., Plaintiff-Appellee, vs. The Five Smiths, Inc., Defendant-Appellant.	No. 5-6
The Five Smiths, Inc., Plaintiff-Appellant, vs. William H. Holloway, et al., Defendants-Appellees.	No. 5-7
United States of America, Plaintiff-Appellee, vs. The Five Smiths, Inc., Defendant-Appellant.	No. 5-8

[Filed June 20, 1974]

Emmet J. Bondurant, Kilpatrick, Cody, Rogers, McClatchey & Regenstein (Martin E. Kilpatrick, Matthew H. Patton and Susan Cahoon, on the brief) for appellant The Five Smiths, Inc.

James A. Eichelberger, Greene, Buckley, DeRieux & Jones, for appellee Burt DeRieux.

Paul T. Michael, Attorney, United States Department of Justice (Carla A. Hills, Assistant Attorney General, and Stanley D. Rose, Attorney, Department of Justice, on the brief) for appellee United States of America.

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judge:

These consolidated cases are before us pursuant to § 211(c) of the Economic Stabilization Act of 1970, as amended[1] (the amended Act), upon certification by the district court of substantial constitutional issues. We granted the joint motion of the parties to have the entire cases in Nos. 5-7 and 5-8 presented to us for consideration, and subsequently ordered that No. 5-6 be consolidated therewith. Since it now appears that all facts necessary for a complete adjudication of this controversy have been stipulated,[2] we shall exercise our discretion under § 211(c) to decide the cases in their entirety at this time.[3]

At the heart of all three cases is a single question: did the Atlanta Falcons professional football team violate the Economic Stabilization Act by playing football games during the "Phase I" price freeze at prices which exceeded those charged for games played during 1970? Phase I was initiated by Executive

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[1] 12 U.S.C.A. § 1904 n. (Supp. 1974).

[2] The parties have jointly filed a stipulation of facts, with exhibits, to which plaintiff in No. 5-6 has filed a "caveat" reserving the right to present evidence on particular issues.

[3] See *United States v. Ohio*, T.E.C.A., 487 F.2d 936, 938 (1973), *cert. granted*, 42 U.S.L.W. 3457 (Feb. 19, 1974); *National Petroleum Refiners Association v. Dunlop*, T.E.C.A., 486 F.2d 1388, 1391-1392 (1973).

Order 11615, 36 Fed. Reg. 15727 (1971), and was effective during the 90-day period from August 15 through November 13, 1971.

The Five Smiths, Inc. (the Falcons) operate the Atlanta Falcons as a member of the National Football League (NFL). In No. 5-6, the Falcons are defendant in a class action brought by Burt DeRieux, an Atlanta lawyer, on behalf of all season ticket holders for the 1971 Falcons football season. DeRieux originally sought reimbursement of illegal overcharges. By amendment to the complaint he now additionally seeks treble damages, attorneys fees and costs under § 210(b) of the amended Act.

No. 5-7 is an action by the Falcons against the Office of Emergency Preparedness (OEP), its Director and Regional Director, the Cost of Living Council (CLC), the Executive Director and individual members of the CLC, and the Commissioner of Internal Revenue. The complaint seeks declaratory and injunctive relief against the application and enforcement of the Phase I freeze with respect to Falcons 1971 football ticket prices.

Finally, No. 5-8 was brought by the United States pursuant to § 205 of the original Economic Stabilization Act of 1970[4] (the 1970 Act), to enjoin ticket price violations and to require the Falcons to refund amounts already illegally received.

The docket numbers of the cases reflect the order in which they were filed during September, 1971, all

[4]Pub. L. 91-379, 84 Stat. 796 (Aug. 15, 1970).

in the Northern District of Georgia. Proceedings in all three cases eventually were stayed, by agreement of the parties, pending the outcome of similar litigation involving University of Southern California season football tickets. See *University of Southern California v. Cost of Living Council,* T.E.C.A., 472 F.2d 1065 (1972). A petition for certiorari in *University of Southern California* was denied by the Supreme Court on February 20, 1973. 410 U.S. 928. Thereafter, the Government filed motions for summary judgment in Nos. 5-7 and 5-8. Without reaching the merits of the motions, the district court on February 6, 1974 certified the constitutional issues in all three cases to this court.

In 1970, the Falcons' management decided to raise ticket prices for home games during the 1971 football season. The price increases were announced in January, 1971, and amounted to $1.50 and $2.50 per game, depending upon seat location. Prices were not raised for a few "ground" and "field level" seats; however, such seats represented a small percentage of the 58,000-seat capacity of Atlanta Stadium. Sales of season tickets at the new prices were commenced on February 1, 1971, at which time the Falcons mailed order forms for 1971 season tickets to past season ticket holders. By the end of June, 41,590 season tickets had been sold and fully paid for. These tickets were mailed to purchasers on August 2, 1971, and all were delivered prior to August 15, the date the freeze went into effect.

The Falcons played five home games during the freeze, the first of which was a pre-season "exhibition" game. Unlike many NFL teams, the Falcons did not play any exhibition games at home prior to August 15. Of the total number of individual game tickets eventually sold for the five games played during the freeze, 217,151 were sold prior to August 15 (mostly in the form of season tickets) and 45,601 were sold thereafter. The amount of revenue from these five games which is attributable to the challenged price increases is $407,912.00. It is this sum (trebled in No. 5-6)[5] which is the subject of the present litigation.

The Falcons' argument before this court may fairly be described as a frontal assault upon two decisions which have become fixtures in the scheme of economic stabilization law. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, D.D.C., 337 F. Supp. 737 (1971) *(Meat Cutters)*, decided by a three-judge district court prior to the establishment of the Temporary Emergency Court of Appeals, upheld the constitutionality of the Economic Stabilization Act as it existed in August, 1971, when Phase I was initiated. Even more fundamental to the development of the law of this court has been *University of Southern California v. Cost of Living Council, supra (USC)*. The rather narrow issue decided in that case—whether the Phase I freeze applied to tickets sold prior to the freeze for sporting events occurring during the freeze

[5]Possibly because DeRieux purports to represent season ticket holders only, the recovery sought in 5-6 is somewhat less than three times the $407,912.00 figure.

—apparently has not been laid to rest. See *Manning v. University of Notre Dame Du Lac*, T.E.C.A., 484 F.2d 501 (1973); *Oakland Raiders v. Office of Emergency Preparedness*, N.D. Calif. (No. C-71-2213, Jan. 2, 1974), *appeal docketed*, T.E.C.A. No. 9-11 (March 21, 1974); and *cf. Murphy v. O'Brien*, T.E.C.A., 485 F.2d 671 (1973). Broader reliance has come to be placed upon a more general aspect of *USC*, namely, the opinion's analysis and application of the "great deference test" in the context of economic controls administration. *USC, supra*, pp. 1068-1069. See *United States v. IBEW Local 11*, T.E.C.A., 475 F.2d 1204, 1209 (1973); *Plumbers Local 159 v. Construction Industry Stabilization Committee*, T.E.C.A., 479 F.2d 1052, 1056 (1973); *Baldwin County Electric Membership Corp. v. Price Commission*, T.E.C.A., 481 F.2d 920, 923, *cert. denied*, 414 U.S. 909 (1973); *Pacific Coast Meat Jobbers Association, Inc. v. Cost of Living Council*, T.E.C.A., 481 F.2d 1388, 1392 (1973); *Murphy v. O'Brien, supra*, p. 674; *City of Groton v. Federal Power Commission*, T.E.C.A., 487 F.2d 927, 934 (1973); *United States v. Ohio*, T.E.C.A., 487 F.2d 936, 941 (1973), *cert. granted*, ... U.S. ..... (Feb. 19, 1974). See also *United States v. Lieb*, T.E.C.A., 462 F.2d 1161, 1166 (1972), decided prior to *USC*.

In arguing that *Meat Cutters* and *USC* were wrongly decided, the Falcons offer five contentions which form the principal issues common to all three cases now under consideration:

(1) Properly interpreted, Executive Order 11615 does not forbid these price increases;

(2) The Economic Stabilization Act of 1970, as it existed during Phase I, represents an unconstitutional delegation of legislative authority to the executive branch of the Government;

(3) Executive Order 11615 violated § 202(b) of the Economic Stabilization Act;

(4) Executive Order 11615 and the regulations issued thereunder violated § 553 of the Administrative Procedure Act; and

(5) The application of Executive Order 11615 to forbid these price increases represents (a) an unconstitutional bill of attainder or *ex post facto* law; (b) an unconstitutional taking of property without just compensation; and (c) an unconstitutional deprivation of due process of law.

No. 5-6 raises a sixth issue, namely, whether either the 1970 Act or the December 22, 1971 amendments thereto[6] (the 1971 Amendments) created a private right of action to recover for Phase I price violations occurring prior to the enactment of the amendments.

Issues 1 and 2 only were actually litigated in *USC* and *Meat Cutters*. With respect to such issues, the Falcons urge that we overrule *USC* and refuse to follow *Meat Cutters*. The Falcons have mounted their attack with skill and resolve, as evidenced by their principal brief of 155 pages. Still, we are not persuaded. We have concluded that the Falcons violated a lawful Executive Order issued pursuant to a constitutional statute, and that the ticket price increases must be refunded.

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[6]Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743.

We have further concluded in No. 5-6 that violations of the Order which occurred during the Phase I freeze period are not subject to private actions by individual or class plaintiffs.

Executive Order 11615 and the relevant regulations and interpretations issued thereunder are fully described in the *USC* opinion, 472 F.2d at 1066-1067. We have set out the pertinent section of the Order below.[7] In brief, the Order established a 90-day freeze on prices, rents, wages and salaries, effective August 15, 1971. Permissible price levels were to be determined by reference to the nearest preceding 30-day period during which a "substantial volume of actual transactions" had occurred. Since the Falcons had not played any home football games during the 30 days preceding August 15, the definition of "actual transactions" became crucial in determining the proper "ceiling price" for their upcoming games. If a football game "transaction" did not "occur" until the games were actually played, the ticket price charged

[7] "Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise."

during the 1970 season would establish the proper ceiling price for 1971 games.

Cost of Living Council Order No. 1, 36 Fed. Reg. 16215 (Aug. 20, 1971), delegated the CLC's authority to implement the Order to the OEP. Subsequently, the OEP issued Economic Stabilization Regulation No. 1, 36 Fed. Reg. 16515 (Aug. 21, 1971, which elaborated on the requirements of Executive Order 11615, but was nevertheless "very brief and basic in content." *USC* at 1067. The Regulation defined various terms contained in the Order and Regulation, but did not define the phrase, "actual transactions." By amendment dated August 24, 1971, the Regulation announced that the OEP would from time to time issue "circulars containing implementing instructional material." Circular No. 7, issued September 2, stated that a service transaction occurs "when the service is performed." Nine days later, in Circular No. 11, the OEP issued the statement which was to become the focal point of the *USC* case:

> "The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze."

In *USC* we held that the "implied assertion that a sporting event constituted a service," and the conclusion in Circular No. 11 that the freeze applied to advance sale tickets for sporting events, represented "a reasonable and consistent interpretation of the Executive Order, and one entitled to this court's respect." 472 F.2d at 1072.

1. *Did USC correctly interpret Executive Order 11615?*

The Falcons advance two interpretative arguments. First, they argue that the sale and delivery of the season tickets prior to August 15 constituted completed transactions within the meaning of the Executive Order and Regulation. If so, the Falcons would have been entitled both to retain the full amounts already received and to charge an equally high price for tickets sold after August 15 (since the pre-freeze sales would have established the proper ceiling price). Second, in the alternative, they contend that irrespective of whether a higher ceiling price was established prior to August 15, the Falcons did not "charge, assess or receive" a price after August 15 with respect to some 41,000 season tickets and therefore the prices of those tickets were exempt from the freeze.

It is conceded that *USC* fully disposed of the first argument adversely to the Falcons. As for their second contention, the Falcons urge that the *USC* court was not presented with the precise argument here put forward. In fact, in Part IV of *USC*, pp. 1069-1070, the court specifically considered and rejected a retroactivity argument. While it is unclear whether the words "charge, assess, or receive" were there given the forceful emphasis accorded them by the Falcons, it is beyond dispute that *USC* undertook to authoritatively interpret the Executive Order in light of a nearly identical set of facts. The Falcons have not brought to our attention any additional factors (such as legislative history) which were not presented in

USC. They rely entirely upon the text of the Order itself, the relevant portion of which comprises a single paragraph. Under these circumstances, *USC* must be regarded as dispositive of both interpretative arguments here raised.

We subscribe fully to the reasoning and holding of *USC*, and deem it unnecessary to repeat what was set forth in that opinion. In light of Falcons' strenuous effort to upset *USC*, and because of one factual difference based on the Falcons' status as a *professional* football team, some additional comments directed to two of their arguments are nevertheless appropriate.

First: The Falcons generally urge that the OEP position with regard to ticket prices was inconsistent with its rulings in other areas, *e.g.*, university tuition, and that even the ticket price policy was reversed for purposes of Phase II. The identical arguments were considered and rejected in *USC* (pp. 1071-1072). We merely note that when the agency was again required to implement a general price freeze at the outset of Phase IV, as opposed to the more flexible system of controls represented by Phase II, it once again interpreted the freeze to apply to advance ticket sales. See CLC Freeze Group Questions and Answers Release No. 4, 38 Fed. Reg. 16651 (1973); and *cf. Murphy v. O'Brien, supra.*

The Falcons also contend that they were subject to a particular inconsistency with regard to the salaries paid to their football players. Falcons prayers were employed under two separate contracts. The

first was a collective bargaining agreement negotiated by the players' union, the NFL Players Association. This agreement established, *inter alia*, the pay schedule for the 1971 pre-season "exhibition" games. The second agreement was the "standard player contract," the salary provisions of which varied and which were negotiated on an individual player basis. The standard player contract provided compensation for the players' services during the regular season of football play. Prior to August 15, the Falcons agreed to pay $117,300 in increased salaries under standard player contracts.

Sometime subsequent to September 7, 1971, OEP Director George A. Lincoln issued an interpretative ruling to the NFL Players Association. The ruling recited that "[a]ccording to a decision of the CLC on September 7, 1971," players who were already in training camps prior to August 15 under 1971 standard player contracts were entitled to receive any increases prescribed therein. We have not been informed of any effort by the Falcons to contest this ruling. The Falcons now argue, however, that the ruling has placed the OEP "in the incongruous position of advocating a price freeze on the sale of tickets without a corresponding wage freeze on the salaries of the players who performed in the same games."

In USC, we stated that "[i]f the haste necessitated [by the freeze] gave rise to unreasonable inconsistencies in the administrative interpretations, or to actions plainly without the purpose and scope of the Order, then we will readily rectify them." 472 F.2d at 1069.

We cannot say that the alleged disparity here represents an unreasonable inconsistency in the agency's administration of the Order. It is clear that the standard player contract was not limited to the regular football season.[5] Conversely, in addition to setting salaries for preseason games, the collective agreement established minimum salaries for the regular season as well. The collective agreement contemplated, and indeed required, the signing of individual standard player contracts. The two agreements thus covered different aspects of a single period of employment. Under the OEP ruling, salary provisions contained in the player contracts escaped the freeze only if performance of this single employment service was begun prior to August 15. In sum, the continuing service required of a football player under these contracts is sufficiently different from the discrete services performed by the Falcons—*i.e.*, performance of football games—to justify this result.

Second: The Falcons argue that *USC* erroneously focused on the provisions of the Executive Order which relate to ceiling price, and ignored the portion of the Order which describes the actual conduct to be

[5]Paragraph 1 of the contract provides that "[t]he term of this contract shall be from the date of execution hereof * * *." The OEP ruling was expressly limited to players "who have signed 1971 contracts." Paragraph 2 of the contract recites the player's agreement "during the term of this contract to report promptly for the Club's training sessions and, at the Club's direction, to render his full time services during such training sessions and to participate in all practice sessions and in all League and other football games scheduled for or by the Club." Further, Paragraph 3 expressly provides that the Club shall pay board, lodging and travel expenses for away-from-home training or games during the preseason period.

prohibited. The language relied upon is contained in the third sentence of § 1(a) of the Order, quoted *supra* n. 7. In pertinent part, the third sentence provides that "[n]o person shall charge, assess, or receive * * * in any transaction prices * * * in any form higher than those permitted hereunder * * *." Closely related to this contention is the argument that *USC* erred in according "great deference" to an agency interpretation which is in alleged conflict with the clear meaning of the quoted language. That meaning, the Falcons assert, is that prices which have been fully collected prior to August 15 are beyond the Order's reach.

We begin by emphasizing that there is textual support for the OEP's interpretation of the Order, the Falcons' contention to the contrary notwithstanding. The Order proscribes higher prices "in any transaction." For ceiling price purposes, the Order expressly looks to price "pertaining to * * * actual transactions." It is not unreasonable to construe the third sentence of the Order to incorporate this same concept, *i.e.*, to proscribe higher prices which pertain to future transactions, even though payment may already have been conditionally received. Just as a service transaction may reasonably be said to "occur" at the time of performance, a price may be deemed to be "charged" as of that same date. *Cf.* CLC Release No. 4, *supra*, 38 Fed. Reg. 16651. This is particularly true when it is realized that under the Falcons' alternative interpretation, patrons who had purchased tickets well in advance of the freeze would pay higher prices to sit side by side with fans who bought tickets

after August 15. Thus, even if we were to yield to the Falcons' insistence that we interpret the Order *de novo,* it is not at all clear that we would reach a result different from that of the OEP.

The point of *USC* was that such a *de novo* analysis by the courts is both unnecessary and improper. "In delegating to the agencies the duty to develop the very definitions of the words used in the Order, the broadest possible delegation of power was given." *USC* at 1068. The delegation by the 1970 Act itself was no less broad. Congress, in § 202(a), had said only that prices might not be reduced below the levels of May 25, 1970.[9] See *USC* at 1070. It is no abdication of our constitutional role for this court to recognize the breadth of the delegations involved in this particular statute and this particular Order. The Supreme Court has stated in the context of an earlier price control statute that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).[10] As discussed

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[9] "§ 202. Presidential authority

(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities."

[10] The Falcons emphasize that the cited quotation is followed by this sentence: "The legality of the result reached by this process, of course, is quite a different matter." The "legality" referred to is the regulation's validity under the enabling statute and the Constitution. 325 U.S. at 414, 418-419. As noted above, the Act itself requires only that prices be stabilized at levels not below those of May 25, 1970. The *constitutional* validity of the Order as interpreted and applied is discussed elsewhere in this opinion.

above and as fully explained in *USC,* Circular No. 11 was not "plainly erroneous or inconsistent" with Executive Order 11615. Accordingly, we hold once again that such ticket price increases violated the Executive Order.

2. *Was the 1970 Act an unconstitutional delegation of legislative power?*

Relying upon *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935), the Falcons urge that the 1970 Act is void as representing an unconstitutional delegation of legislative power to the President. It is conceded that subsequent to *Schechter,* no federal statute had been held unconstitutional by the Supreme Court on that basis. Among the statutes to survive a delegation challenge was the Emergency Price Control Act of 1942. *Yakus v. United States,* 321 U.S. 414 (1944).

In *Almalgamated Meat Cutters & Butcher Workmen v. Connally,* D.D.C., 337 F. Supp. 737 (1971), *supra,* a three-judge district court upheld the 1970 Act in the face of a delegation challenge. Several other district courts have reached the same result.[11] The exhaustive and learned opinion by Judge Leventhal in *Meat Cutters* has been favorably cited by this court on several occasions. See *United States v. Lieb, supra,* p. 1165; *USC, supra,* p. 1070; *IBEW Local 11*

[11]See, *e.g., California Teachers Association v. Newport Mesa Unified School District,* C.D. Calif., 333 F. Supp. 436, 446-447 (1971); *United States v. Cincinnati Transit, Inc.,* S.D. Ohio, 337 F. Supp. 1068, 1072 (1972).

v. Boldt, T.E.C.A., 481 F.2d 1392, 1395, *cert. denied*, 414 U.S. 1092 (1973). It appears, however, that this is the first occasion upon which our court has been called to directly decide the delegation question. This likely is due in part to the fact that the 1971 Amendments appear to have eliminated any doubt as to the Act's validity under Article I of the Constitution.

We are in substantial agreement with the reasoning of *Meat Cutters*, and concur in the result there reached. It would serve only to unduly prolong this opinion were we to further elaborate our views on this subject. Accordingly, on the authority of *Meat Cutters*, we hold that the Economic Stabilization Act of 1970, as it existed on August 15, 1971, was not an unconstitutional delegation of legislative power to the President.

3. *Did Executive Order 11615 violate § 202(b) of the Economic Stabilization Act?*

As originally enacted on August 15, 1970, the Economic Stablization Act did not restrict the President's authority to institute selective economic controls. Accordingly, on March 29, 1971, the President issued Executive Order 11588, 36 Fed. Reg. 6339, which provided for the stablization of wages and prices in a single industry (the construction industry) Less than two months later, Congress amended § 202 of the 1970 Act to add the following provision:

> "(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking

> into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages, have increased in the economy generally." Pub. L. 92-15, 85 Stat. 38 (May 18, 1971).

This provision remained in effect until the enactment of the 1971 Amendments on December 22, 1971. No comparable provision was retained in the amended Act.

The Falcons argue that Executive Order 11615 violated § 202(b) because (1) the Order affected "a particular industry or segment of the economy" only, and (2) no prior determination was made by the President that prices or wages in the affected segment increased at a rate which was grossly disproportionate to the rate at which prices or wages increased in the economy generally. The parties stipulated that the following segments of the economy were not subject to regulation under the Order: (1) raw agricultural products, (2) exports, (3) interest rates, (4) corporate stocks and bonds and municipal bonds, and (5) corporate dividends. On brief, the Falcons assert that the excluded segments represent business receipts during 1971 of 555 billion dollars, or approximately 20 per cent of total business receipts in the United States. The parties have further stipulated that at the time of the issuance of Executive Order 11615, the President did not determine that prices and wages affected by the Order had increased at a grossly dis-

proportionate rate when compared with the economy generally.

We initially note that of the five listed exempt categories, only raw agricultural products were expressly excluded by the Order. Prices of exports and stocks and bonds were first exempted by OEP Regulation No. 1, pursuant to the agency's authority under § 4(a) of the Order to grant exemptions. 36 Fed. Reg. at 16515. Interest rates and corporate dividends were not subject to the freeze because they were not "prices, rents, wages, or salaries" within the meaning of the Act and the Order. See OEP Circular Nos. 1 and 3, 36 Fed. Reg. 16587 and 17345 (1971); and see Conf. Rep. No. 91-1386, 91st Cong., 2d Sess., p. 7 (1970).[12] Since § 202(b) refers only to the rate at which "prices or wages" have increased in the economy generally, the relevance of economic data pertaining to dividends and interest is questionable.

In any event, in light of both the language of § 202(b) and the legislative purpose behind its enactment, the Falcons' contention is without merit. Even if 80 per cent of the economy may be literally regarded as a "segment" of the entire economy, it surely is not a "particular * * * segment" within the meaning of § 202(b). It would be anomalous to require a finding that wages and prices comprising 80 per cent of the economy had increased at a rate "grossly disproportionate" to such increases in the "economy generally." Finaly, the Report of the Senate Committee

[12]Interest and dividends subsequently were brought within the Act's coverage by §§ 202 and 203(a)(2) of the 1971 Amendments.

on Banking, Housing and Urban Affairs relative to § 202(b) confirms that the finding requirement was directed only at the imposition of controls over relatively small segments of the economy:

> "The committee has serious reservations about applying the price and wage control authority *to a single industry.* An industry subject to price controls has no control over the price it must pay for the products of other industries. Likewise, workers subject to wage controls have no protection against a continued rise in the cost of living.
> * * *
> "As a restriction on using the wage-price control authority *on a single industry,* the committee approved an amendment requiring a specific finding by the President. Under the amendment, the President is prohibited from using the authority *in a single industry* unless he determines that wages or prices in that industry have increased at a rate which is grossly disproportionate to the rate for the economy as a whole, after taking into account any mitigating factors such as the seasonal nature of employment or the rate of unemployment or under employment in the particular industry." S. Rep. No. 92-89, 92d Cong., 1st Sess., 1 U.S. Code Cong. & Admin. News 1971, pp. 1048-1049 (emphasis added).

Since § 202(b) does not apply to the controls instituted by Executive Order 11615, the President's action need only fall within the general authority conferred by § 202(a), *supra.* Such section clearly authorized the imposition of controls over something less than the entire economy.

4. *Did Executive Order 11615 and the regulations thereunder violate the Administrative Procedure Act?*

The Falcons contend that Executive Order 11615, CLC Order No. 1, and OEP Regulation No. 1 were issued without observance of procedures required by § 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. In pertinent part, § 553 provides as follows:

> "(b) General notice of proposed rule making shall be published in the Federal Register * * *. Except when notice or hearing is required by statute, this subsection does not apply—
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> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
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> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making * * *.
>
> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, * * *."

No general notice of proposed rule making preceded the issuance of any of the orders or regulations here challenged. Further, neither Executive Order 11615 nor CLC Order No. 1 contained an express finding, accompanied by reasons, that "notice and public proce-

dure * * * are impracticable, unnecessary, or contrary to the public interest." OEP Regulation No. 1 did contain such a finding, but only by virtue of an amendment to the Regulation dated November 12, 1971, *i.e.*, one day before Phase I was to expire.

Since each of the three challenged actions raise somewhat different problems, we shall treat them separately.

a. *Executive Order 11615*

The first question raised by the Executive Order is whether the President is an "agency" within the meaning of the APA. The case for subjecting the President of the provisions of the APA is a strong one.[13] Courts have shown some reluctance to decide the question, however, in view of potential ramifications under the Freedom of Information Act,[14] see *Soucie v. David*, D.C. Cir., 448 F.2d 1067, 1073 (1971), and the judicial review provisions of the APA,[15] see *Sou-*

[13] 5 U.S.C. § 551 defines "agency," for purposes of §§ 551-559, to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; * * *." "The President" is not in terms excluded. In view of the glaring exclusion of two of the three principal branches of the Government, an intention not to exempt the President may be readily inferred. *Cf.* the Federal Register Act, 44 U.S.C. § 1501 *et seq.*, in which "agency" is defined by listing included offices, and where "the President" is included and "the legislative or judicial branches of the Government" are excluded. In *Meat Cutters, supra*, Judge Leventhal without deciding the question cited three leading scholars for the proposition that "the term 'agency' in the APA includes the President." 337 F. Supp. at 761.

[14] 5 U.S.C. § 552.

[15] 5 U.S.C. §§ 701-706. As is here relevant, the definition of "agency" contained in § 701 is identical to that in § 551.

ate Select Committee on Presidential Campaign Activities v. Nixon, D.D.C., 366 F. Supp. 51, 58 (1973). Upon this certification the Government had not made known its position with regard to this important question. We shall therefore assume, *arguendo*, that the President is an agency within the meaning of the APA.

The issue thus becomes whether we must set aside the Order for failure to conform with the procedural requirements of 5 U.S.C. § 553. In *Meat Cutters*, *supra*, these requirements were recognized but were deemed to be of little practical consequence in view of the exception provided by § 553(b)(B), *supra*. 337 F. Supp. at 761. The problem here cannot be so easily dismissed since the Government has stipulated that the finding required to invoke the inception was not made.

At the outset, we are satisfied that there was in fact "good cause" to find that advance notice of the freeze was "impracticable, unnecessary, or contrary to the public interest" within the meaning of § 553(b)(B). This conclusion is based upon facts so obvious that they may be judicially noticed. Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct "actual transactions"—or avoid them—before the freeze deadline. Each price increase would have generated further increases in a growing spiral of inflation. We note in this connection the remarks of George P. Schultz, Director of the Office of Management and Budget, made during the course of an August 15, 1971

press conference, immediately prior to the President's announcement of the freeze:

> "* * * It is very difficult for the people in the administration to talk publicly about something like a wage-price freeze or something of that kind because immediately people raise their prices. In fact, I would say—and I don't have any really strong evidence to this effect—but I would say that the very large increase in the industrial component of the wholesale price index in July that was reported a week or so ago probably reflects a reaction to all of the talk, with people putting their list prices up. * * * "[16]

While the legislative history of the 1970 Act does not reveal consideration of the problem discussed by Director Schultz,[17] it is clear that Congress anticipated the need for abrupt action in dealing with inflation. The Report of the House Committee on Banking and Currency repeatedly refers to the President's power under the Act as "standby authority." H.R. Rep. No. 91-1330, 91st Cong., 2d Sess., pp. 9, 11, 20 (1970). It would appear that a major factor in the decision of Congress to delegate such authority was its belief that only the Executive could properly react to day-to-day changes in the economy.[18] The

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[16] CCH Economic Controls ¶8367, p. 8406 (1972).

[17] The House Committee on Banking and Currency subsequently did acknowledge this reason for secrecy in connection with Phase I, however. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., p. 4 (1971).

[18] In response to criticism that the freeze should be instituted by Congress directly, and not by the President, the Committee Report states: "[A wage-price freeze] is not a legislative function, both in terms of appropriate timing in instituting the controls and removing them, since only the Executive can determine the appro-

psychological value of a "dramatic" initiation of controls appears also to have been contemplated. *Meat Cutters, supra,* p. 752. And although not phrased in terms of a finding for purposes of § 553(b)(B), *supra,* the preamble to the Order itself refers to another ground for urgency: "Whereas, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries * * *."

The Falcons argue that because (1) the Government has stipulated that no finding was made, and (2) no finding and statement of reasons was incorporated in the Executive Order, the Order should now be set aside. We cannot agree that Congress intended to visit such consequences upon a technical violation of § 553(b) where the reasons for exempting the President's action from the notice requirement are so obvious and compelling. *Cf. Appalachian Power Co. v. Environmental Protection Agency,* 4 Cir., 447 F.2d 495, 502-503 (1973); *Duquesne Light Co. v. Environmental Protection Agency,* 3 Cir., 481 F.2d 1, 8 (1973). A failure to incorporate in rules a statement of basis and purpose, in technical violation of § 553(c), has been held not to void the rules where "[b]oth the basis and purpose are obvious from the specific governing legislation and the entire trade was fairly apprised of them by the procedure followed." *Horing Corp. v. Federal Trade Commission,* 2 Cir., 290 F.2d 803, 807 (1961). In both cases upon which the Falcons prin-

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priate time for instituting the controls and removing them * * *." Further: "if the Congress had mandated such action through to the termination date [of the Act], it would well be days or weeks before such action would be rescinded by the Congress if needed * * *." H. R. Rep. No. 91-1330, *supra,* p. 11.

cipally rely,[19] the inquiry was quite properly directed at whether the agency in fact had good cause to bypass the notice requirement. We hold that Executive Order 11615 did not violate § 4 of the Administrative Procedure Act.

b. *CLC Order No. 1*

On August 17, 1971, the CLC issued its Order No. 1 under the title, "Delegation of Authority." 36 Fed. Reg. 16215. The Order consisted of five brief paragraphs. The first and second paragraphs delegated the CLC's authority under §§ 1, 4(a), 5 and 7 of Executive Order 11615 to the Director of the OEP. Paragraph 3 of Order No. 1 directed executive departments and agencies to assist the Director pursuant to 31 U.S.C. § 691; paragraph 4 required consultation with the CLC on significant policy decisions; and paragraph 5 permitted the Director to redelegate the authority thereby conferred.

Section 553(b)(A) excepts, *inter alia*, "rules of agency organization, procedure, or practice" from the notice requirement of § 553. Nothing contained in CLC Order No. 1 goes beyond the matters thus excluded. Accordingly, Order No. 1 did not violate the APA.

c. *OEP Regulation No. 1*

The bulk of OEP Regulation No. 1 merely rephrases and interprets the Executive Order. Indeed, section 1 of the Regulation states that the Regulation's

[19] *Texaco, Inc. v. Federal Power Commission*, 3 Cir., 412 F.2d 740 (1969); *Kelly v. Dept. of Interior*, E.D. Calif., 339 F. Supp. 1095 (1972).

purpose is to "promulgate initial guidance and procedures" for implementing the freeze. To the extent that the Regulation is thus an "interpretative rule," it falls within the exception to § 553 provided by § 553(b)(A). To the extent that it arguably may prescribe non-exempt rules (none of which would appear to affect the Falcons in this case), the considerations previously set forth with respect to the Executive Order apply with equal force to the Regulation. We thus need not decide whether the amendment to the Regulation dated November 12, 1971, which was nothing more than a *pro forma* statement of the obvious, [20] could retroactively cure a technical flaw in the rule.

5. *Additional constitutional questions: Does Executive Order 11615 as applied represent an ex post facto law or bill of attainder, a taking of property without just compensation, or a denial of due process of law?*

The Falcons finally advance a variety of constitutional arguments relating to the allegedly retroactive nature of the Executive Order as here applied. Similar arguments on previous occasions have been uniformly rejected by our court. See *USC, supra,* p. 1070; *IBEW Local 11 v. Boldt, supra,* p. 1395 (just

[20] "Because of the need for prompt determinations, notice of proposed rule making and public procedure thereon have been found to be impracticable and contrary to the public interest." 36 Fed. Reg. 21761 (1971).

compensation); *Western States Meat Packers Association, Inc. v. Dunlop,* T.E.C.A., 482 F.2d 1401, 1403-1404 (1973) (just compensation); see also, *Meat Cutters, supra,* pp. 763-764 (due process); *Taylor v. Brown,* Emer. Ct. App., 137 F.2d 654, 659-660, *cert. denied,* 320 U.S. 787 (1943) (*ex post facto,* just compensation).

The Falcons argue from the assumption that their rights in the season ticket sale proceeds were "vested" and "unqualified" as of August 15, 1971. Such assumption is faulty inasmuch as the Falcons concede, elsewhere in their brief, that if the games had not been performed they would have been liable for the purchase price. See, *e.g., De La Ysla v. Publix Theatres Corp.,* 26 P.2d 818 (Utah 1933). The authorities cited by the Falcons do not so much indicate that a ticket is not a contract, as hold that the seller's duty and the remedies for breach thereof are limited. A ticket does not create an irrevocable right of entry, *Marrone v. Washington Jockey Club,* 227 U.S. 633 (1913), nor does it warrant against personal injuries, *Jordan v. Concho Theatres, Inc.,* 160 S.W.2d 275 (Tex. Civ. App. 1941). We are cited to no case, however, which indicates that the Falcons could refuse to perform the scheduled games with impunity on the ground that their prior rights were "unqualified."[21]

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[21] Contrast *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), holding that a statute which deprived mortgagees of substantial existing rights in specific mortgaged property violated the Fifth Amendment.

It is well settled that Congress may interfere with private contractual obligations where such interference is a necessary incident of otherwise valid legislation. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-311 (1935); *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 480-483 (1911); *USC, supra*, p. 1070. That one of the contracting parties may have completely performed his obligations does not remove this "congenital infirmity" (*Norman, supra*, p. 308) which is a part of every contract subject to Congressional power. *Louisville & Nashville R. Co. v. Mottley, supra.*

As for the *ex post facto* clause, the Order cannot be said to *punish* the Falcons for prior conduct within the meaning of such cases as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809), and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). See also, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798). Neither is the Order a bill of attainder, see *United States v. Brown*, 381 U.S. 437, 447 (1965). It is true that § 204 of the 1970 Act prescribes fines for willful violations. However, the Government has sought only an injunction and restitution under § 205, for which there is no requirement of willfulness, and none of the letters or telegrams referred to in the Falcons' complaint threaten criminal action or accuse the Falcons of willful wrongdoing. In *Manning v. University of Notre Dame Du Lac*, T.E.C.A. 484 F.2d 501, 503-504 (1973), on nearly identical facts, we indicated that the violation likely was not willful within the meaning of § 208(a) of the amended Act (the successor to § 204). In any event, any fine which might

be imposed would be based upon willful conduct which occurred after the effective date of the Order.

II

No. 5-6 arises out of plaintiff Burt DeRieux's purchase of four Atlanta Falcons season tickets in June 1971. On August 27, 1971, DeRieux by letter demanded the return of $1.50 per ticket per game; the demand was rejected by the Falcons on September 2. Thereafter, on September 10, DeRieux filed the present class action on behalf of all Falcons season ticket holders. DeRieux's action preceded by seventeen days the Government's suit for injunction and restitution (No. 5-8).[22]

Both the original and first amended complaints alleged that the action arose under the Economic Stabilization Act of 1970, and invoked federal jurisdiction under 28 U.S.C. § 1331.[23] The complaints recognized, however, that the plaintiff sought relief "not provided for in the Economic Stabilization Act, Executive Order 11615, or in any other administrative forum, and which only this Court can grant." By amendment to the complaint, filed July 23, 1973, De-

[22]DeRieux alleges that the Government instituted its enforcement action only as a result of his persistent protests, which included the August 27 letter to the Falcons, a complaint with the Internal Revenue Service dated September 9 and, shortly thereafter, the present lawsuit.

[23]Apparently recognizing the jurisdictional problem posed by *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), DeRieux now additionally claims that jurisdiction is conferred by 28 U.S.C. § 1337, under which there is no requirement of a $10,000 minimum amount in controversy.

Rieux alleged for the first time that his claim was based upon § 210 of the amended Act.[24]

The amendment further alleged that the Falcons "have and continue to willfully refuse to refund the amount due * * * despite the decision of the Temporary Emergency Court of Appeals in [*USC*]." Finally, the amendment sought treble damages in the amount of $1,140,000.00, attorneys fees and costs pursuant to § 210(b) of the amended Act.

The principal question now presented is whether either the 1970 Act or § 210 of the amended Act

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[24] "§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

create a private right of action for Phase I violations which occurred prior to December 22, 1971, the date on which § 210 was enacted.

In terms, the 1970 Act, in § 205, provided only for injunctive relief in actions brought by an agency of the United States:

> "Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section * * * that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title."

Section 7(b) of the Executive Order conferred upon the CLC the authority "in its discretion" to request the Department of Justice to bring actions for injunctions under § 205.

Faced with the absence of any express authority for a private right of action under the 1970 Act, DeRieux argues that such a right may be implied from the purposes and policies of the Act. See *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). More specifically, the argument is that "the class's claim

is within the scope of the very rights which the statute and the Executive Order were attempting to protect." The purpose of the Act, DeRieux argues, was "to protect consumers from an increase in prices."

The question of implied private rights of action was most recently the subject of Supreme Court review in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, ... U.S. ..... (No. 72-1289, Jan. 9, 1974). There, the Court undertook to construe § 307(a) of the "Amtrak Act," 45 U.S.C. § 547(a). Section 307(a) authorized enforcement actions by the Attorney General and, in cases involving a labor agreement, by affected employees or their representatives. After examining legislative history and the policies of the Act, the Court concluded that § 307(a) provided the exclusive remedies for violations and that no additional private right of action could properly be inferred.

In some respects, the problem in *Railroad Passengers* was different than that posed by § 205 of the Economic Stabilization Act. Since the Amtrak Act expressly authorized some private actions (by employees under a labor agreement), the maxim *expressio unius est exclusio alterius* applied with particular force to other private actions not so authorized. In addition, in drafting the final Amtrak bill Congress had considered and rejected a proposal to permit suits by any "aggrieved person." Our review of the legislative history of the Economic Stabilization Act of 1970 has failed to reveal any specific considera-

tion of proposals to create or limit private rights of action.[25]

We are not left totally without guidance, however. In interpreting the 1970 Act, the provisions of prior economic controls legislation are significant. *Meat Cutters, supra,* p. 748. Both the Emergency Price Control Act of 1942 and the Defense Production Act of 1950 provided for private damage actions in addition to Government suits for injunctions and fines. 56 Stat. 23, 34; 64 Stat. 798, 811. The similarity in language between § 205 and the injunction provisions of the two earlier statutes indicates that § 205 was derived from those provisions; this is confirmed by the legislative history.[26] From this background of prior law, Congress surely was aware of the possibility of private enforcement, and its failure to expressly provide for private actions in the 1970 Act can only be regarded as intentional.

Further, an examination of the purpose of the 1970 Act supports the conclusion that the remedies contained in § 205 were intended to be exclusive. Congress anticipated that the President would implement the Act by imposing a short term freeze of only two or three months' duration. H.R. Rep. No. 91-1330,

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[25]The adequacy of the Act's enforcement provisions were challenged, however, both in hearings and on the floor of the House. See Hearings on H.R. 17880 before the House Committee on Banking and Currency, 91st Cong., 2d Sess., pp. 83-84; 116 Cong. Rec. 23837 (1970) (remarks of Representative Anderson).

[26]Remarks of Representative Reuss, Hearings on H.R. 17880, *supra* n. 25, pp. 5-6 (1970): "The language of title II is derived from the battle-tested language of the Emergency Price Control Act of 1942."

supra, p. 9. The purpose of the anticipated freeze was to break the nation's "inflationary psychology" and to provide a breathing period during which longer term controls could be formulated. See *Meat Cutters*, *supra*, pp. 747-748, 751-752; Hearings on H.R. 17880, *supra* n. 25, pp. 6, 11-12. It is entirely reasonable that Congress would choose not to confer individual rights of action with respect to controls of such short duration and uncertain consequence.

The difference between the Economic Stabilization Act of 1970 and statutes under which an implied private right of action has been recognized is apparent. Unlike the Voting Rights Act of 1965,[27] the Securities Exchange Act of 1934,[28] or the Federal Safety Appliance Acts,[29] the Economic Stabilization Act was not designed to protect or confer "private rights" within the usual meaning of that phrase. Indeed, as the present case well illustrates, the effect of the Act and Order in many instances was destructive of private contract rights. Rather, the Act prescribed emergency medicine to remedy an affliction affecting the entire national economy. Individuals were ultimately sought to be benefitted, but as a consequence of overall economic stabilization. There was no intention to benefit a specific class. *Cf. Daly v. Columbia Broadcasting System, Inc.*, 7 Cir., 309 F.2d 83 (1962). Even when Congress amended the Act to provide for individual actions, in § 210, its principal

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[27]See *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

[28]See *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[29]See *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916).

concern was deterrence and effective enforcement, and not the vindication of individual "rights" as such. See H.R. Rep. No. 92-714, 92d Cong., 1st Sess., pp. 8, 28 (1971). We conclude that a private right of action cannot be inferred from the 1970 Act.[30]

DeRieux next argues that even if no implied right of action was created by the 1970 Act, the December 22, 1971 amendments to the Act supplied the previously missing remedy. The question is whether § 210 of the amended Act, *supra* n. 24, may be read to have retrospective effect.

If § 210 were solely concerned with perfecting a remedy for previous violations of the law, it might well permit the construction here urged. See *Bradley v. Richmond School Board*, ... U.S. ..... (No. 72-1322, May 15, 1974); *Koger v. Ball*, 4 Cir. ..... F.2d ..... (No. 73-2332, May 10, 1974). But the 1971 Amendments did more than merely make recovery more convenient or more certain. Section 210(b) provides for the awarding of a sum equal to the greater of (1) three times the amount of the overcharge, or (2) not less than $100 nor more than $1,000. Thus, the damages available under § 210(b) are punitive in nature and substantially larger than those previously recoverable in Government actions for restitution. The amendment to the complaint here invokes these

[30] Accord, *ICA Southeast, Inc. v. Optimum Systems, Inc.*, E.D. La., CCH Economic Controls ¶9999A(1), p. 9991 (1971). *Cf. Heavy Contractors Association, Inc. v. Operating Engineers Local 571*, D. Neb., 328 F. Supp. 897 (1971); and see *Acorn Iron & Supply Co. v. Bethlehem Steel Co.*, E.D. Pa., 96 F. Supp. 481 (1951).

very provisions in seeking treble damages in excess of $1,100,000.

For this reason, we believe that § 210 represents an exception to the general rule regarding retrospective application in pending cases of changes in the law. That rule, as recently articulated by the Supreme Court in *Bradley v. Richmond School Board, supra,* is that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given *recognition and effect.*" Slip op. at 17-18. The *Bradley* Court was nevertheless careful to state that courts need not always apply intervening law in the absence of clear legislative direction to the contrary. Rather, exceptions should be drawn where application of the intervening statute would result in manifest injustice. The Court further indicated that the question of retrospective application was to be determined in each case by analysis of "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 20.

Here, the decisive factor is the impact of § 210 upon the Falcons' rights. Unlike the *Bradley* situation, where the intervening statute merely provided for an award of attorneys fees to which plaintiffs arguably already were entitled, the application of § 210 would impose "an additional [and] unforeseeable obligation" in the form of potential treble damages. *Id.* at 24. Even though such an award is discretionary with the district court, its prospect alone

might have caused the Falcons to order their conduct differently so as to avoid the risk. *Id.* at 23. In light of the new obligation imposed, § 210 should not be construed to act retrospectively.[31]

This conclusion is fortified by the deterrent purpose of § 210, above referred to. Only future conduct can be deterred. Further, where Congress desired that the 1971 Amendments apply to pending cases (or, by analogy, to previous violations), it did not lack for words to make such purpose clear. Compare § 210(a), *supra* n. 24, with § 211(a) and (h).[32] We do not read *Bradley* to hold that evidence of legislative intent short of express statutory language is irrelevant to the retroactivity question, and we believe these factors are significant.

DeRieux finally argues that § 210 applies prospectively to the Falcons' continuing refusal to refund the overcharges. Such contention was squarely rejected in *Manning v. University of Notre Dame Du Lac, supra,* where we held that the "overcharge" occurred, at the latest, at the time the football games

[31] Accord, *Piaskoski v. Associated Hospital Service, Inc.*, E.D. Wis., 347 F. Supp. 470 (1972). See also, *United States v. St. Regis Paper Co.*, S.D. N.Y., 106 F. Supp. 286, 291 (1952) (amended regulation under Defense Production Act).

[32] "§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder * * *.
* * *

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."

were played. The argument that the "legal wrong" language of § 210(a) provides a separate basis for relief was also there rejected. 484 F.2d at 504.

It is true that *Manning* applied the provisions of § 210 in a class action based upon a Phase I violation. *Manning* did not recognize or treat the threshold retroactivity issue, however, and is therefore in no way contrary to our disposition of this case. See *Webster v. Fall*, 266 U.S. 507, 511 (1925).

DISPOSITION

Pursuant to the authority granted by § 211(c) and (h) of the Economic Stabilization Act of 1970, as amended, this court now makes the following disposition of these consolidated cases:

The complaint in No. 5-6 fails to state a claim upon which relief may be granted. Accordingly, No. 5-6 is remanded to the district court with directions to dismiss the complaint.

In No. 5-7, defendants are entitled to judgment as a matter of law. No. 5-7 is therefore remanded to the district court with directions to enter judgment in accordance with this opinion in favor of defendants.

In No. 5-8, the United States is entitled to judgment as a matter of law. Accordingly, No. 5-8 is remanded to the district court with directions to enter judgment in accordance with this opinion in favor of plaintiff. The district court is further directed to determine and carry out such remedies as it may deem appropriate, including the amount and manner in

which restitution should be made. See *University of Southern California v. Cost of Living Council, supra,* 472 F.2d at 1070; *Murphy v. O'Brien, supra,* 485 F.2d at 676, compare *Manning v. University of Notre Dame Du Lac, supra.*

Remanded with directions.

Appendix D

ADMINISTRATIVE PROCEDURE ACT, TITLE 5, U.S.C.

PROCEDURE

551 *Definitions.*—For the purpose of this subchapter [§§ 551-559 of this title]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 §§2456(a), 2457];

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 381.)

553. *Rule making.*—(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 333.)

706. *Scope of review.*—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review thee whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 393.)

Appendix E

THE PRESIDENT
EXECUTIVE ORDER 11615

Providing for Stabilization of Prices, Rents, Wages, and Salaries

WHEREAS, in order to stabilize the economy, reduce inflation, and minimize unemployment, it is necessary to stabilize prices, rents, wages, and salaries; and

WHEREAS, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries in order to improve our competitive position in world trade and to protect the purchasing power of the dollar:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970 (P. L. 91-379, 84 Stat. 799), as amended, it is hereby ordered as follows:

SECTION 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall

charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of section 1 and 2 hereof shall not apply to the prices charged for raw agricultural products.

SECTION 2. (a) There is hereby established the Cost of Living Council which shall act as an agency of the United States and which is hereinafter referred to as the Council.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, and the Special Assistant to the President for Consumer Affairs. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Eco-

nomic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) Under the direction of the Chairman of the Council a Special Assistant to the President shall serve as Executive Director of the Council, and the Executive Director is authorized to appoint such personnel as may be necessary to assist the Council in the performance of its functions.

SECTION 3. (a) Except as otherwise provided herein, there are hereby delegated to the Council all of the powers conferred on the President by the Economic Stabilization Act of 1970.

(b) The Council shall develop and recommended to the President additional policies, mechanisms, and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries after the expiration of the 90-day period specified in Section 1 of this Order.

(c) The Council shall consult with representatives of agriculture, industry, labor and the public concerning the development of policies, mechanisms and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries.

(d) In all of its actions the Council will be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international and other economic policies of the United States.

(c) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

SECTION 4. (a) The Council, in carrying out the provisions of this Order, may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order.

(b) The Council may redelegate to any agency, instrumentality or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each Executive department or agency is authorized and directed, consistent with law, to furnish the Council with available information which the Council may require in the performance of its functions.

(d) All Executive departments and agencies shall furnish such necessary assistance as may be authorized by section 214 of the Act of May 3, 1945 (59 Stat. 134; 31 U.S.C. 691).

SECTION 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order, and may require any person to main-

tain and produce for examination such records or other evidence, in such form as it shall require, concerning prices, rents, wages, and salaries and all related matters. The Council may make such exemptions from any requirement otherwise imposed as are consistent with the purposes of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

SECTION 6. The expenses of the Council shall be paid from such funds of the Treasury Department as may be available therefor.

SECTION 7. (a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than $5,000 for each violation.

(b) The Council shall in its discretion request the Department of Justice to bring actions for injunctions authorized under Section 205 of the Economic Stabilization Act of 1970 whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order.

THE WHITE HOUSE,
August 15, 1971.

/s/ RICHARD NIXON

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NOTE: For the text of the President's radio and television address in connection with E.O. 11615, above, see Weekly Comp. of Pres. Does., Vol. 7, No. 34, issue of Aug. 23, 1971.